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No. 98-1648

In the Supreme Court of the United States

GUY MITCHELL, ET AL., PETITIONERS,

v.

MARY L. HELMS, ET AL., RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether a program under Chapter 2 of Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 7301 *et seq.*, which provides federal funds to state and local educational agencies to purchase and lend secular, neutral, and nonideological materials such as computers, software, and library books to public and nonpublic schools for use by the students attending those schools, and which allocates the funds on an equal per-student basis, regardless of the religious or secular character of the schools the students choose to attend, violates the Establishment Clause of the First Amendment.

PARTIES TO THE PROCEEDINGS

Guy Mitchell, Jan Mitchell, Claire Taylor, Eddie Greer, Colleen Greer, Dennis Thornton, and Darlene Thornton were intervenors in the courts below and are petitioners herein.

Mary Helms, Amy Helms, and Marie Schneider were plaintiffs in the district court and are respondents herein.

Cecil J. Picard, Louisiana Superintendent of Public Education; Kenneth Duncan, Louisiana State Treasurer; and the Louisiana State Board of Elementary and Secondary Education were defendants in the district court and are respondents in support of petitioners herein.

The Jefferson Parish School Board System; Elton LaGasse, Superintendent of the Jefferson Parish Public School System; Barry Bordelon, President and member of the Jefferson Parish School Board; Polly Thomas, Vice-President and member of the Jefferson Parish School Board; and Chris Roberts, Ray St. Pierre, Laurie Rolling Hogan, Karen Barnes, Gene Katsanis, Libby Moran, and Martin Marino, all of whom are members of the Jefferson Parish School Board, are respondents in support of petitioners herein. These respondents will not be filing a separate brief in this Court, but have filed a letter with the Court indicating their support for petitioners.

Richard W. Riley, United States Secretary of Education, and the United States Department of Education were defendants in the district court and are respondents in support of petitioners herein.

The Special Education Services Corporation, a not-for-profit corporation, was a defendant in the district court with respect to a program not at issue on certiorari, and is not participating herein.

The Jefferson Parish Nonpublic Transportation Corporation, a not-for-profit corporation, was a defendant in the district court with respect to a program not at issue on certiorari, and is not participating herein.

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James Madison, *Memorial and Remonstrance Against Religious Assessments*, attached as Appendix to dissenting opinion of Rutledge, J., *in Everson* v. *Board of Education*, 330 U.S. 1, 63 (1947) 35, 40

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Transcript of Oral Argument, *Zobrest* v. *Catalina Foothills School District*, 509 U.S. 1 (1993), *reprinted in* 224 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 513 (Philip B. Kurland & Gerhard Casper, eds. 1994) 42

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Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL. 657 (1998) 38

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-78a) is reported at 151 F.3d 347. The order of the court of appeals denying the petitions for rehearing and suggestions for rehearing *en banc* (Pet. App. 152a-155a) is reported at 165 F.3d 311. The opinion of the district court (Pet. App. 79a-118a) is unreported. The prior opinions of the district court on this subject (Pet. App. 119a-136a, 137a-151a) are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 1998. Petitioners' timely petition for rehearing and suggestion for rehearing *en banc* was denied on January 13, 1999. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * * ." The statutory and regulatory provisions pertinent to this case are set forth at Pet. App. 157a-193a.

STATEMENT OF THE CASE

Petitioners are parents of children attending nonpublic, religiously affiliated schools in Jefferson Parish, Louisiana. Under Chapter 2 of Title I of the Elementary and Secondary Education Act of 1965 ("ESEA"), 20 U.S.C. § 7301 *et seq.*, their children receive access to library books, computers, computer software, and other instructional materials. This federal program has been in existence in different forms for 34 years. It serves millions of children, including more than a million attending private religious schools, in keeping with the congressional goal of ensuring that all schoolchildren—regardless of the public or private, religious or secular nature of their educational choices—have access to instructional materials and equipment appropriate to this technological age.

In direct conflict with a decision of the U.S. Court of Appeals for the Ninth Circuit, *Walker* v. *San Francisco Unified School District*, 46 F.3d 1449 (9th Cir. 1995), the Fifth Circuit held that Chapter 2 is unconstitutional as applied to children attending religiously affiliated schools. The effect of the decision below, if not reversed, will be to disrupt the administration of this important federal program, to impede achievement of Congress's educational objectives for all schoolchildren, to deny technologically sophisticated educational tools to more than a million American schoolchildren, and to require discrimination against these schoolchildren solely on the basis of their families' constitutionally protected decision to choose an education under religious auspices.

I. CHAPTER 2 PROGRAM

A. Background Of The Program

Chapter 2 has its origins in President Lyndon Johnson's January 12, 1965 "education message," which called for a national program to improve educational opportunities for America's youth. See S. Rep. No. 89-146 (1965), *reprinted in* 1965 U.S.C.C.A.N. 1446, 1448-1449. Congress responded by enacting the ESEA to "improve the education of young Americans." *Id.* at 1448.

The ESEA was the first major federal program of assistance for elementary and secondary education since Reconstruction. The touchstone of this historic legislation was the decision to extend the benefits of secular educational services and materials to *all* schoolchildren, in both public and nonpublic schools, on a nondiscriminatory basis. See Samuel Halperin, *ESEA Twenty Years Later: A Political Retrospective, in* A Compilation of Papers on the Twentieth Anniversary of the Elementary and Secondary Education Act of 1965, Subcommittee on Elementary, Secondary, and Vocational Education of the House Committee on Education and Labor, 99th Cong., 1st Sess. 4, 14-17, 21-22 (Aug. 1985).

In keeping with this commitment, nonpublic schoolchildren were included both in Title I, the precursor of the program upheld in *Agostini* v. *Felton*, 521 U.S. 203 (1997), and in Title II, the precursor of the program at issue in this case. Title II authorized

federal funding of public educational agencies for the acquisition of library resources, textbooks, and other instructional materials to be loaned for the use of students in public and nonpublic schools.

In enacting the ESEA, Congress was well aware of potential constitutional issues, and sought to design the program in such a way as to benefit all schoolchildren without providing unlawful aid to religious institutions or religious instruction. Congress concluded that assistance could be extended to children attending private religious schools so long as the assistance consisted of secular, neutral, and nonideological materials and was provided on a neutral and nondiscriminatory basis, with equipment and materials owned by, and under the control of, public school authorities. The legislation was "carefully reviewed" by the Department of Justice, which determined that it "conformed with constitutional requirements." H.R. Rep. No. 89-143, at 23 (1965). The committee that drafted the legislation also "had the benefit of the extensive testimony of constitutional lawyers, religious group representatives, and other organizations who gave the committee helpful guidance in perfecting the final language of the bill so as to assure careful compliance with both constitutional requirements and the principle of separation of church and state." *Ibid.* Congress was assured, even by traditional opponents of direct aid to religious schools including the National Council of Churches, the Baptist Joint Committee, the American Civil Liberties Union, and the National Education Association,[1] that this approach would preserve the necessary separation between church and state.

Representative Barrett of Pennsylvania, a prominent supporter of the legislation, explained its constitutional basis:

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[1] See 111 Cong. Rec. 7702 (1965) (National Council of Churches); *id.* at 7706-7707 (Baptist Joint Committee); *id.* at 6124 (ACLU); Halperin, *supra*, at 20-21 (National Education Ass'n). Rep. Bingham commented that he was "impressed with the fact that not only the Department of Justice, but many organizations sensitive to this [church-state] issue have concluded that the bill does not violate the first amendment." 111 Cong. Rec. at 6141.

The bill now under consideration would extend educational benefits to all American children who are in need of help, regardless of the type of school they attend. That is, the Federal Government would aid in the education of both public and private school pupils. But need this call forth the needless fear of Government support of religion? I sincerely think not. The bill is replete with guarantees that no public funds will be expended except under the control of public agencies. There will be no unrestricted grants to private schools. The students of private schools would benefit by * * * using publicly approved learning resources lent to them by public authorities. The private schools themselves would be enriched in no material way, and no public moneys could be used to further sectarian instruction. Due to these guarantees and controls in the language of this bill, I see no constitutional inconsistencies in the various programs proposed.

> If there is any valid question about this issue, it would appear to be this: Can America help itself more by helping only a part of its children, or by helping all of them?

111 Cong. Rec. 6142 (1965). Representative Anderson of Tennessee added that the "church-state issue seems satisfied as fully as human judgment can make it so. Control and selection of all programs, the disbursement of funds and the title to all property and books involved rests in local public school officials, through whom these services are given to all needy children." *Id.* at 6141. See also *id.* at 6102-6103 (Rep. Landrum); *id.* at 6124 (Rep. Roosevelt); *ibid.* (Rep. Perkins); *id.* at 6139 (Rep. Pucinski); *id.* at 6140-6141 (Rep. Moeller); *id.* at 7613 (Sen. McClellan); *id.* at 7624 (Sen. Fulbright); *id.* at 7713 (Sen. Miller). The arguments made in defense of the constitutionality of the bill on the floor of Congress foreshadowed, to a remarkable extent, the reasoning of this Court in *Board of Education* v. *Allen*, 392 U.S. 236 (1968).

Since 1965, Congress has repeatedly reauthorized this program, with minor modifications, in subsequent federal aid-to-education

legislation.[2] On each of these occasions, Congress preserved this essential feature of the original program: "the participation of private school students on an equitable basis, with equal expenditures for private and public school students," through the loan of secular educational materials. *Walker*, 46 F.3d at 1454 (citing *former* 20 U.S.C. § 2972(a)-(b)).

B. The Chapter 2 Statute

Chapter 2 provides financial assistance through block grants to state educational agencies ("SEAs") and local educational agencies ("LEAs") (typically school districts) in several areas of "targeted assistance." See 20 U.S.C. §§ 7301, 7351. Chapter 2 funds are allocated on a neutral and objective basis. States receive Chapter 2 funds in accordance with the total number of children aged five to seventeen in the State. See 20 U.S.C. § 7311(b). Funds are then allocated to LEAs based on the number of participating elementary and secondary school students (including both public and private, nonprofit schools), with adjustments made on the basis of the number of children from low-income families living in areas with a high concentration of such families or living in sparsely populated areas. See 20 U.S.C. § 7312(a)-(b); Pet. App. 87a.

LEAs are required to "assure equitable participation" of nonpublic schoolchildren in the program. 20 U.S.C. § 7372(a)(1).

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[2] The Education Consolidation and Improvement Act of 1981 ("ECIA"), *former* 20 U.S.C. §§ 3811-3816, consolidated several federal education programs into one program providing education block grants to States for specified purposes, including the acquisition of school library resources, textbooks, and other instructional materials and equipment. The common name of the program, "Chapter 2," comes from this legislation. The program was again reauthorized by Title I of the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297, 102 Stat. 130 (1988), *codified at former* 20 U.S.C. § 2911 *et seq.* Most recently, it was reauthorized as Title VI of the Improving America's Schools Act of 1994 ("IASA"), Pub. L. No. 103-382, 108 Stat. 3518, 3707, *codified at* 20 U.S.C. §§ 7301-7373 (1994). To be consistent with the Fifth Circuit's decision, we will refer to current IASA Subchapter VI as "Chapter 2" and will cite to the currently operative IASA provisions.

Indeed, the statute specifies that expenditures for the benefit of nonpublic schoolchildren "shall be equal (consistent with the number of children to be served) to expenditures for programs under this subchapter for children enrolled in the public schools of the local educational agency, taking into account the needs of the individual children and other factors which relate to such expenditures." *Id.* § 7372(b). The allocation of resources is thus determined entirely by the educational choices of children and their families, with benefits neither skewed in favor of, nor against, religious or secular education. The vast majority of schoolchildren who benefit from the federal Chapter 2 program attend public schools. In Louisiana, more than 70 percent of Chapter 2 funds are spent for the benefit of public school students. Pet. App. 108a; *cf. Walker*, 46 F.3d at 1464 (74% of Chapter 2 benefits in San Francisco go to public school children).

The challenged portion of Chapter 2 provides funding to public educational agencies for "the acquisition and use of instructional and educational materials, including library services and materials (including media materials), assessments, reference materials, computer software and hardware for instructional use, and other curricular materials." 20 U.S.C. § 7351(b)(2). Schools select materials according to their students' needs from among materials that public educational officials have pre-determined to be appropriate for use by students at both public and nonpublic schools. All Chapter 2 materials must be "secular, neutral, and nonideological." 20 U.S.C. § 7372(a)(1); 34 C.F.R. § 299.9(c)(1) (1998).

Control of all funds and title to all equipment and materials under the program are retained by a public agency and limited to "the uses and purposes provided in [the Act]." 20 U.S.C. § 7372(c)(1); 34 C.F.R. § 299.9(a) (1998). Those uses and purposes are set forth in 20 U.S.C. §§ 7301(b), 7303, and relate to "increasing the academic achievement levels of all children." The statute forbids "the making of any payment under this chapter for religious worship or instruction." *Id.* § 8897. All Chapter 2 materials must "supplement" and may not "supplant funds from non-Federal sources." 20 U.S.C. § 7371(b); see also 34 C.F.R. § 299.8(a) (1998).

C. Federal, State, And Local Safeguards To Ensure Compliance With Chapter 2 Requirements

Chapter 2 and its implementing regulations contain extensive safeguards to ensure that public funds are reserved for use in compliance with the foregoing statutory requirements.[3] SEAs and LEAs must certify that they "will keep such records and provide such information to the Secretary [of Education] as may be required for fiscal audit and program evaluation," 20 U.S.C. § 7332(a)(4), and to demonstrate "that there is compliance with the specific requirements of" Chapter 2, *id.* § 7332(a)(6) (SEAs); *id.* § 7353(a)(1)(B)(3)-(4) (LEAs). Moreover, LEAs and SEAs must submit annual or biennial reports regarding their use of Chapter 2 funds. See *id.* § 7332(a)(2)(A).

Like other States, Louisiana has adopted additional safeguards to assure that Chapter 2 funds are used solely for statutory purposes. For example, written Chapter 2 guidelines are distributed to all LEAs. See J.A. 212-261. In addition, Louisiana requires that nonpublic school officials sign a written assurance that Chapter 2 materials "will only be used for secular, neutral and nonideological purposes" (J.A. 261[4]), and that school officials submit both an "evaluation plan," describing the intended use for each requested item, and a detailed "evaluation report," specifying how use of the

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[3] The Secretary of Education has recently adopted amended guidelines for the administration of Chapter 2. See U.S. Dep't of Educ., Guidance for Title VI of the ESEA: Innovative Education Program Strategies 19-20 (Feb. 1999) (lodged with Clerk). All of the safeguards contained in these revised guidelines were previously contained in the Louisiana state guidelines, and thus do not materially affect the operation of this program or the disposition of this case. Compare *ibid.* with *infra* pages 7-8.

[4] Originally, these written assurances were not mandatory. See J.A. 94-95 (discussion of old policy). In 1989, however, new guidelines making them mandatory were issued. See J.A. 260-261 (new guidelines issued 5 months after initial Lewis deposition); *id.* at 120 (participants "must sign" and "must assure [State]" of matters contained on form); *id.* at 123 (State could terminate participation of school that did not comply with assurance).

materials in practice compares with the evaluation plan.[5] The State has also instituted a systematic program of periodic written reporting and on-site monitoring, including biennial LEA site visits by state administrators. Pet. App. 88a; J.A. 94-95. Finally, the State provides in-service training for all LEA Chapter 2 coordinators concerning, among other things, prohibitions on the religious use of funds and materials. See J.A. 194.

In addition to federal- and state-level safeguards, the Jefferson Parish Public School System ("JPPSS")—which bears primary "responsibility for the design and implementation" of Chapter 2 programs (20 U.S.C. § 7301(c))—has implemented local procedures to ensure that Chapter 2 materials and equipment are used for statutory purposes. For example, the JPPSS conducts annual orientation sessions for nonpublic Chapter 2 contact personnel concerning Chapter 2's statutory and regulatory requirements (see J.A. 194-203), and sends annual written reminders to nonpublic schools that Chapter 2 prohibits the acquisition of religiously oriented material and that Chapter 2 equipment and materials must be used only for "secular, neutral and nonideological purposes" (J.A. 178, 175-183). JPPSS officials conduct annual monitoring visits to nonpublic schools, including interviews, reviews of equipment and materials and recording of use, and random sampling of books purchased with Chapter 2 funds for religious content. J.A. 141-143, 148-159, 210.

Library books for use by nonpublic schoolchildren in Jefferson Parish must be ordered from the LEA, which in turn places orders from catalogs that are provided by secular "book jobbers" under contract with the JPPSS. J.A. 126, 209-210. All requests for library books and instructional materials made on behalf of non-

[5] The record contains examples of these reports. See, *e.g.*, J.A. 244-245, 248-249 (completed form describing what class computer will be used in and for what purposes); J.A. 256-259 (identifying how many students used computers and in which classes and for what purposes they were used).

public schoolchildren are examined by public school officials, and any item that is religious in nature is deleted. J.A. 137-138, 210.[6]

Finally, all Chapter 2 materials and equipment are clearly marked as Chapter 2 property owned by public authorities, and participating schools must maintain records of their use. J.A. 142-143. This ensures that the Chapter 2 materials and equipment are used only for statutory purposes, and not in connection with courses in religious instruction.

D. Chapter 2 In Operation

The uncontested evidence of record demonstrates that the statute operates according to its terms and that Chapter 2 materials and equipment are used solely for the congressional purpose of "increasing the academic achievement levels of all children" (20 U.S.C. § 7303), rather than for "religious worship or instruction" (*id.* § 8897).

Despite extensive discovery, respondents have identified only isolated events that purport to show that program safeguards have broken down. Br. in Opp. 2, 4 & n.2. One such event, in which religious books were purchased in violation of Chapter 2 statutory restrictions, occurred several years before the operative complaint was filed and long before the guidelines that govern the program were in place. Pet. App. 91a. Public authorities discovered the mistake and promptly rectified it. J.A. 137-138, 133. Respondents' other principal allegation of misuse of materials involved the supposed use of a filmstrip projector in religion class. In support

[6] In their brief in opposition (at 6), respondents asserted that library books provided under Chapter 2 are not prescreened for religious content, citing Chief Judge Heebe's March 27, 1990 findings of fact (Pet. App. 150a). This disregards the fact that the prescreening procedures were instituted some 14 years ago, that Judge Heebe's findings of fact were vacated, and that on reconsideration the district court found as a fact that the materials were, and are, prescreened. Pet. App. 107a (district court finding that the "library books and other instructional equipment are prescreened" and that "these controls are sufficient to prevent Chapter 2 benefits from being diverted to religious instruction"); see also *id.* at 91a (summarizing the evidence).

of their allegation, however, respondents cite a chart concerning use of all audio-visual materials, including materials *not* purchased with Chapter 2 funds. Br. in Opp. 4 n.2 (citing Woodward Ex. 21 (see J.A. 204-208)). There is no evidence that any materials purchased with Chapter 2 funds were ever used in religion classes, or for other nonstatutory purposes.

In short, as the district court found (Pet. App. 107a), and the Ninth Circuit concluded on a similar record (*Walker*, 46 F.3d at 1467-1468), the program complies with the terms of Chapter 2 and federal, state, and local guidelines and implementing regulations. The program provides federal funds to state and local educational agencies to purchase and lend secular, neutral, and nonideological materials such as computers, software, and library books to public and nonpublic schools for use by the students attending those schools, and allocates the funds on an equal per-student basis, regardless of the religious or secular character of the schools the students choose to attend.

II. PROCEEDINGS BELOW

A. Proceedings In The District Court

Respondents Mary L. Helms, et al. ("respondents"), in their capacity as taxpayers, filed their initial Complaint in December 1985, and a Second Amended and Supplemental Complaint in December 1988. Among other challenges not relevant here, respondents claimed that Chapter 2, as administered in Jefferson Parish, violates the Establishment Clause. The named defendants included federal, state, and local educational authorities responsible for administering the challenged programs. Petitioners, parents of children who attend religiously affiliated schools and benefit from the challenged programs, intervened to defend their constitutionality. J.A. 1 (No. 45).[7]

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[7] For a complete list of parties, see page ii, *supra*. Petitioners Guy Mitchell and Jan Mitchell were parents of children attending religiously affiliated schools and eligible for Chapter 2 benefits at the time, and remain so. Claire Taylor, Eddie Greer, Colleen Greer, Dennis Thornton, and Darlene Thornton were substituted for original intervenors Eugene Cerise and Kathy Cerise, and are also petitioners here.

Respondents were afforded a full opportunity to seek out evidence supporting their allegations. During some four years of discovery, respondents made numerous document requests and conducted more than 30 depositions of Chapter 2 administrators as well as principals and teachers in participating nonpublic schools. See, *e.g.*, J.A. 2 (Nos. 123, 143).

In late 1989, respondents moved, and petitioners and the federal defendants cross-moved, for summary judgment on the Chapter 2 issues. In March 1990, the district court (Heebe, C.J.) granted respondents' motion, denied the cross-motions, and subsequently entered judgment. Pet. App. 137a-151a. The court held that the Establishment Clause prohibits the provision of any assistance to the educational functions of "pervasively sectarian" schools, no matter how carefully designed and delivered. Pet. App. 149a-150a. Petitioners and the federal defendants promptly moved for reconsideration and to alter or amend the district court's judgment with respect to the Chapter 2 program. The court, however, issued no further decisions on the Chapter 2 challenge for nearly seven years. During this period, the initial decision was stayed, and the program continued in operation without interruption.

After Chief Judge Heebe's retirement, the case was reassigned to District Judge Livaudais. The parties then submitted briefs on the motions for reconsideration and for alteration and amendment of the judgment. No party suggested any material change in the facts regarding the Chapter 2 program. In January 1997, based on supervening precedent, Judge Livaudais granted the motions and vacated Judge Heebe's Order and Reasons, including his findings of fact. Pet. App. 79a-118a. Judge Livaudais granted the cross-motions of petitioners and the federal defendants for partial summary judgment, and dismissed respondents' claims with respect to Chapter 2. *Ibid.*

Judge Livaudais relied on this Court's recent decisions in *Zobrest* v. *Catalina Foothills School District*, 509 U.S. 1 (1993), and *Rosenberger* v. *Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995), and on the Ninth Circuit's decision in *Walker*, wherein the court rejected a virtually identical Establishment Clause challenge to a California Chapter 2 program. Pet. App. 102a-108a. "Increasing the quality of education," the court

explained, "is clearly a valid secular purpose." Pet. App. 107a. And insofar as "Chapter 2 benefits are neutrally available without reference to religion[,] the loaning of neutral, secular equipment and instructional materials to parochial schools * * * does not have the primary or principal effect of advancing religion." *Ibid.*

In addition, the court made the following factual findings regarding the operation of the Chapter 2 program in Jefferson Parish:

> The library books and other instructional equipment are prescreened and title remains with the public agency. Most parochial schools sign a pledge agreeing not to use the Chapter 2 materials for religious purposes and the Chapter 2 coordinator makes yearly monitoring visits to the nonpublic schools. In addition, the State makes monitoring visits every two years to the nonpublic schools. Finally, employees of a public agency provide the Chapter 2 services and no money is directly paid to the parochial schools. The Court * * * finds that these controls are sufficient to prevent Chapter 2 benefits from being diverted to religious instruction.

Ibid.

B. Proceedings In The Court Of Appeals

The Fifth Circuit reversed. Relying on *Meek* v. *Pittenger*, 421 U.S. 349 (1975), and *Wolman* v. *Walter*, 433 U.S. 229 (1977), the court held the Chapter 2 program unconstitutional as operated in Jefferson Parish. Pet. App. 71a. It read those cases as drawing a categorical line between state programs lending textbooks for the use of students in parochial schools, which are constitutionally permissible, and "programs lending instructional materials *other than textbooks* to parochial schools and schoolchildren," which are constitutionally forbidden. Pet. App. 67a. The appellate court did not disturb the district court's factual findings.

The Fifth Circuit acknowledged that this Court's most recent relevant precedent, *Agostini* v. *Felton*, 521 U.S. 203 (1997), "discard[ed] a premise on which *Meek* relied—*i.e.*, that '[s]ubstantial aid to the educational function of [sectarian] schools * * * *necessarily* results in aid to the sectarian school enterprise as a whole.'" Pet. App. 70a (quoting *Meek*, 421 U.S. at 366). However, the court interpreted *Agostini* as having no significance beyond the specific facts of that case. "*Agostini*," the court reasoned, "*holds* only that the aid at issue there (*i.e.*, the on-premises provision of special education services by state-paid teachers) was not the kind of governmental aid that impermissibly advanced religion." Pet. App. 70a. The decision "says nothing about the loan of instructional materials to parochial schools." *Ibid.* Because *Agostini* "does not even address" the issue of instructional materials other than textbooks, the court concluded that it was required to follow *Meek* and *Wolman*, even if the analytical premises underlying those decisions had been "discarded" by this Court. *Ibid.* In short, because Chapter 2 involves "instructional materials" (disapproved in *Meek*) and not textbooks (approved in *Board of Education* v. *Allen*, 392 U.S. 236 (1968)) or special education services provided by state-paid teachers (approved in *Agostini*), the court concluded that Chapter 2 is unconstitutional.

INTRODUCTION AND SUMMARY OF ARGUMENT

Families of children who attend nonpublic schools pay taxes, just like their public school counterparts. And children who attend nonpublic schools will become citizens and participants in the life of the Nation, just like their public school counterparts. The state therefore has a legitimate interest in the quality of education provided to *all* schoolchildren, no matter where they go to school. Accordingly, from its first modern involvement in aid to elementary and secondary education, Congress has insisted that aid must be provided "on an equitable basis" to all schoolchildren in both public and private schools. Indeed, the ESEA requires that expenditures for private and public school students be "equal." 20 U.S.C. § 7372(a), (b).

Moreover, Chapter 2 has been designed with the explicit goals of "increasing local flexibility" and "encouraging innovation," so that educators can keep pace with changes in technology and pedagogy. 20 U.S.C. § 7301(a). When the program was first established, the emphasis was on printed materials such as reference books and texts; later the focus shifted to instructional equipment such as projectors or televisions. In 1988, Congress amended the statute to authorize acquisition of "computer software

and hardware for instructional use" (*id.* § 7351(b)(2)); these materials, along with library books, are now the principal uses of Chapter 2 funds in Jefferson Parish.

The decision below, if not reversed, will violate both of these principles—of equitable participation and of flexibility and innovation. According to the court below, the Establishment Clause of the First Amendment requires Congress to *discriminate against* children who attend religious schools. The court read this Court's decisions as establishing separate and unrelated rules for various forms of educational assistance: permitting the loan of textbooks and the provision of educational services by public school personnel on private school property, but prohibiting the provision of *all other* instructional materials and services—including modern educational tools like the computer.

There is no logic to these distinctions. There is no significant constitutional difference between a textbook, which is permitted, and library books and computer software, which are forbidden. Each of these items is provided on a neutral basis to public and nonpublic students alike, and each can be examined in advance to ensure that it is secular, neutral, and nonideological.

The decision below thus disadvantages religious schoolchildren without making anyone—not even the plaintiffs—better off. The decision does not protect taxpayers, since it does not reduce the amount of tax money that will be spent for the benefit of students attending religious schools; it only prevents those funds from being used for up-to-date pedagogical resources. The decision is irrelevant to the constitutional purpose of ensuring that the power of the state not be used to favor or endorse religion, since Chapter 2 is scrupulously neutral with respect to religion, allocating its benefits on the basis of strict objective criteria. The decision does nothing to ensure that public funds are used only for neutral, nonideological education; the statute is already limited to neutral and nonideological forms of assistance, and the alternative ways of administering the program (including the purchase of textbooks) present no less (and no more) danger of misuse than the provision of computers, software, and library books. And it certainly does not advance the cause of religious liberty to discriminate in this

way against families who exercise their constitutional right to choose religiously affiliated schools.

The Chapter 2 program has operated with great success for more than a generation, providing supplemental educational tools to all schoolchildren, without any apparent injury to First Amendment values. It has repeatedly been reaffirmed and reenacted by Congresses and Presidents of both political parties. The decision below is a major step backward. Unless reversed, it will disrupt the proper administration of this important and longstanding federal program and interfere with numerous other efforts to improve the educational opportunities of this Nation's schoolchildren.[8]

We will show that the decision below cannot be reconciled with this Court's Establishment Clause jurisprudence. First, in Part A, we will show that the Chapter 2 program is constitutional under the criteria set forth by this Court in its most recent aid-to-education case, *Agostini* v. *Felton*, 521 U.S. 203 (1997). The program does not define its recipients by reference to religion; it does not result in governmental indoctrination; and it does not create an excessive entanglement between government and religion.

Second, in Part B, we will respond to the reasoning of the court of appeals. The cases upon which the lower court relied, *Meek* v. *Pittenger*, 421 U.S. 349 (1975), and *Wolman* v. *Walter*, 433 U.S. 229 (1977), can be distinguished; and if not, they should be overruled for much the same reason that similar rulings were overruled in *Agostini*. The no-aid principle espoused (but haphazardly enforced) in *Meek* and *Wolman* had no grounding in the history or purposes of the First Amendment, produced chaotic and inconsistent results, had deleterious effects on the education of America's children, and created an unnecessary conflict between the Estab-

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[8] For example, the decision below would appear to endanger the constitutionality of a recently enacted program to make Internet and other network services available in libraries and K-12 schools, including religious schools. Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (1996); see *Freedom From Religion Foundation, Inc.* v. *Bugher*, 1999 WL 500025 (W.D. Wis. June 23, 1999) (upholding similar state program).

lishment Clause and the principles of free speech and free religious exercise. The principles of neutrality in funding, protection against governmental indoctrination, and minimization of entanglement enunciated in *Agostini*, by contrast, serve distinct First Amendment purposes and lead to sensible and coherent results. This Court should make clear that the three criteria announced in *Agostini* are applicable to all educational assistance programs, and that any prior inconsistent decisions are no longer good law. It should give clear guidance to legislators, educators, and lower courts that the evenhanded provision of secular, neutral, and nonideological instructional aid to all public and private schoolchildren does not violate the Establishment Clause.

ARGUMENT

THE EVENHANDED PROVISION OF SECULAR, NEUTRAL, AND NONIDEOLOGICAL INSTRUCTIONAL RESOURCES TO ALL PUBLIC AND PRIVATE SCHOOLCHILDREN DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

Until the mid-1970s, in a series of consistent decisions, this Court "permitted the States to provide church-related schools with secular, neutral, or nonideological services, facilities, or materials." *Lemon* v. *Kurtzman*, 403 U.S. 602, 616 (1971) (citing *Everson* v. *Board of Education*, 330 U.S. 1 (1947), and *Board of Education* v. *Allen*, 392 U.S. 236 (1968)). See also *Cochran* v. *Board of Education*, 281 U.S. 370 (1930). Aid to education was struck down only when it was skewed toward private schools or where extensive monitoring and surveillance was required to ensure the secular character of the aid. Acting in accordance with the constitutional principles of that era, in 1965 Congress enacted the ESEA, which remains the cornerstone of federal education policy today. Among other provisions, the ESEA provided federal funding to public educational agencies for two important purposes: to provide remedial instruction for needy children in both public and nonpublic schools (Title I), and to provide innovative educational resources for all schoolchildren (Chapter 2). Congress concluded that these programs were constitutional because they benefitted all schoolchildren equally, and because the assistance was entirely secular and nonideological in form and content. See pages 3-4, *supra*.[9]

A few years after *Lemon*, without overruling these precedents, the Court applied a different approach. In *Meek*, a three-Justice plurality concluded that "it would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed by many of Pennsylvania's church-related

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[9] This congressional judgment is entitled to deference. See *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (an Act of Congress holds a strong presumption of constitutionality, especially "when, as here, Congress specifically considered the question of the Act's constitutionality").

elementary and secondary schools," and held that "[s]ubstantial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian school enterprise as a whole." *Meek*, 421 U.S. at 365-366; see also *Wolman*, 433 U.S. at 250.

This departure from the Court's earlier jurisprudence produced two unfortunate results. First, because of the difficulty of reconciling this new position with prior holdings—compounded by the difficulty of determining what constitutes "substantial" aid to the "educational function" of "pervasively sectarian" schools—this Court and the lower courts became mired in hair-splitting and seemingly arbitrary distinctions between various forms of aid to education. Second, the new theory created the constitutional anomaly of requiring *discrimination against* children on account of their constitutionally protected decision to attend religious schools —a seeming violation of the very neutrality that the Establishment Clause embodies.

The jurisprudence of *Meek* and *Wolman* did not last long. Beginning with *Committee for Public Education & Religious Liberty* v. *Regan*, 444 U.S. 646 (1980), and *Mueller* v. *Allen*, 463 U.S. 388 (1983), and more recently in a string of decisions culminating in *Agostini*, this Court rendered judgments inconsistent with the fundamental assumptions upon which *Meek* and *Wolman* rested. In *Witters* v. *Washington Department of Services for the Blind*, 474 U.S. 481 (1986), for example, the Court unanimously held that the Establishment Clause does not forbid a State to issue a vocational tuition grant to an individual who uses that grant to attend a religious institution. Even though the grant recipient would use the money to obtain religious education, the Court reasoned that the grants were "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." *Id.* at 487 (citation omitted). In a concurrence gaining the support of five members of the Court, Justice Powell explained that "state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon* v. *Kurtzman* test." *Id.* at 490-491 (Powell, J., joined by Burger, C.J., and Rehnquist, J.); see also *id.* at 490 (White, J.); *id.* at 493 (O'Connor, J.). Similarly, in *Zobrest* v. *Catalina Foothills School District*, 509 U.S. 1

(1993), the Court held that it is constitutional for the state to provide a sign language interpreter, on a neutral basis, to a deaf student attending a religious school, even though this would obviously aid the "educational mission" of the school and would entail the communication of religious messages.

Finally, in *Agostini*, this Court recognized that its Establishment Clause jurisprudence had "significantly changed." 521 U.S. at 237. The Court examined the constitutionality of Title I of the ESEA, which provides federal funding on a neutral basis for the provision of remedial educational services by public school personnel on the premises of private religious schools. Such services had been held unconstitutional in *Aguilar* v. *Felton*, 473 U.S. 402 (1985), but the *Agostini* Court held that the premises upon which *Aguilar* rested had been "eroded" by subsequent Establishment Clause decisions, most notably *Zobrest*, *Witters*, and *Rosenberger* v. *Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995). See *Agostini*, 521 U.S. at 218; see also *id.* at 216, 222-238. Most pertinent to this case, the Court explicitly repudiated the *Meek-Wolman* prohibition on "substantial aid to the educational function" of religious schools. See *Agostini*, 521 U.S. at 225 ("we have departed from the rule * * * that all government aid that directly aids the educational function of religious schools is invalid"). *Agostini* thus left *Meek* and *Wolman* without any viable rationale. In place of the *Meek-Wolman* approach, *Agostini* substituted "three primary criteria" for evaluating the constitutionality of aid-to-education programs (described in detail below).

In the court below, petitioners argued that Chapter 2 satisfies the criteria prescribed by this Court in *Agostini* to evaluate the constitutionality of aid-to-education programs. The court, however, felt constrained to disregard the *Agostini* criteria. It complained that "the high Court has instructed us confusingly," noting that *Allen* and *Meek* (let alone *Agostini*) appear to be based on inconsistent principles. Pet. App. 65a. "Lest we fall into despair," the court stated, it would have to "view the Court's cases dealing with state aid to religious schools more in terms of what they did rather than what they said." *Ibid.* Rather than evaluate Chapter 2 in light of this Court's stated constitutional criteria, the court decided that

"based on the character of the aid itself," *Meek* and *Wolman* control the disposition of this case. *Id.* at 66a.

Because we believe this case is controlled by the analysis set forth in *Agostini*, which the court below did not address, we will turn first to that question. We will then show that the alternative analysis, which underlies *Meek* and *Wolman*, should be rejected here, as it was in *Agostini*.

A. Chapter 2 Satisfies The "Three Primary Criteria" Set Forth In *Agostini* For Evaluating The Constitutionality Of Educational Assistance Programs.

In place of the "no substantial aid" rule of *Meek* and *Wolman*, the *Agostini* Court substituted inquiries into whether public aid is distributed on the basis of "criteria that neither favor nor disfavor religion" (521 U.S. at 232) and whether the aid is distributed in a form that would lead to "government inculcation of religious beliefs" (*id.* at 223) or "excessive entanglement" (*id.* at 233). Indeed, the Court set forth this new inquiry in the form of "three primary criteria we currently use to evaluate whether government aid has the effect of advancing religion." *Id.* at 234. We will show that Chapter 2 satisfies each of these criteria, beginning with the most important: the neutrality of the funding allocation formula.[10]

1. Chapter 2 funds are distributed for the benefit of all schoolchildren on the basis of neutral criteria.

This Court has held that where "aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis," it is not likely to have the effect of advancing religion. *Agostini*, 521 U.S. at 231. Accord *Witters*, 474 U.S. at 488; *Zobrest*, 509 U.S. at 10; *Rosenberger*, 515 U.S. at 825; *Mueller* v. *Allen*, 463 U.S. 388, 398-399 (1983); *Widmar* v. *Vincent*, 454 U.S. 263, 274 (1981); see *Walz* v. *Tax Commission*, 397 U.S. 664, 697 (1970) (Harlan, J., concurring). As the late

[10] This Court has consistently found that educational assistance programs have a secular purpose, and respondents have not questioned the secular purpose of Chapter 2.

Justice Lewis Powell explained, "state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon* v. *Kurtzman* test." *Witters*, 474 U.S. at 490-491 (Powell, J., concurring). See also *Lee* v. *Weisman*, 505 U.S. 577, 630 (1992) (Souter, J., concurring) (the Establishment Clause is not violated when "the State has, without singling out religious groups or individuals, extended benefits to them as members of a broad class of beneficiaries defined by clearly secular criteria").

This focus on the neutral allocation of benefits serves a number of interrelated constitutional purposes. First, it maintains the distinction between *governmental* promotion of religion, which the Constitution forbids, and *private* religious decisionmaking, which the Constitution protects. State programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the Establishment Clause, because any aid to religion results from the "genuinely independent and private choices" of individuals, and cannot be attributed to the state. *Witters*, 474 U.S. at 487; see *Mueller*, 463 U.S. at 398-399; *Zobrest*, 509 U.S. at 10; *Agostini*, 521 U.S. at 226, 230-231. Under Chapter 2, the federal government is subsidizing and promoting *education*; it is entirely neutral toward *religion*.

Second, when aid is provided on an evenhanded basis to all schoolchildren, it avoids creating a "financial incentive" to choose religious schooling or to "modify their religious beliefs or practices in order to obtain those services." *Agostini*, 521 U.S. at 231-232; *Zobrest*, 509 U.S. at 10; *Witters*, 474 U.S. at 488. In this way, the Establishment Clause serves as a guarantor of the freedom of religious choice. The financial muscle of the government must not be used to encourage or discourage religious decisions. See Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1001-1002 (1990). Families should be able to choose religious or secular education for their children on the basis of their conscience and convictions, not because the government is funding one and not the other alternative. As parents, petitioners are concerned that the decision below will cause their children to be

left behind their counterparts in public schools, and that this disadvantage will increase as technology continues to advance.

Third, when benefits are distributed among a wide array of beneficiaries on the basis of neutral and objective criteria, there is no implied "endorsement" of religion or "symbolic union" between religion and the state. *Widmar*, 454 U.S. at 274; *Witters*, 474 U.S. at 488-489. See *County of Allegheny* v. *ACLU*, 492 U.S. 573, 593 (1989) (quoting *Wallace* v. *Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring)) (the purpose of the endorsement principle is to "preclude the government from conveying or attempting to convey a message that religion or a particular religion is *favored* or *preferred*") (emphasis supplied by the Court in *Allegheny*). Evenhanded treatment conveys no message of preferred status.

The challenged program plainly satisfies the criterion of neutrality. Chapter 2 "does not * * * define its recipients by reference to religion." *Agostini*, 521 U.S. at 234. Funds are allocated on a per capita basis, with 15% earmarked for children from low-income families. This is a strictly neutral and objective basis for allocating resources, with no discretion vested in governmental officials to favor or disfavor religion.[11] Indeed, the bulk of the funding—some 70%—goes for the benefit of children in public schools. The statute requires that expenditures on behalf of nonpublic students be equal to those on behalf of their public school counterparts. 20 U.S.C. § 7372(b). Congress's intention is to benefit schoolchildren, and the schoolchildren carry their entitlement wherever they go. Consequently, the allocation of

[11] Chapter 2 must therefore be distinguished from programs such as the Adolescent Family Life Act, 42 U.S.C. § 300z *et seq.*, upheld in *Bowen* v. *Kendrick*, 487 U.S. 589 (1988), where government officials decide which recipients will receive benefits and how much. See *id.* at 596-597 (grants are awarded to applicant organizations based on the Secretary's assessment of their merits under statutory criteria). While discretionary programs are not necessarily unconstitutional as applied to religious grant recipients (see *Kendrick*), they are subject to more stringent controls against the use of funds for religious activities, since any use of the aid to inculcate religion could—unlike here—be attributed to the government.

funds among schools is a product of private and independent choice, not state decisionmaking.

With respect to this criterion, Chapter 2 is constitutionally indistinguishable from Title I, upheld in *Agostini*. Chapter 2 funds are "allocated on the basis of criteria that neither favor nor disfavor religion." The benefits are "available to all children, * * * no matter what their religious beliefs or where they go to school." The program "does not, therefore, give aid recipients any incentive to modify their religious beliefs or practices in order to obtain those services." *Agostini*, 521 U.S. at 232.

2. *The Chapter 2 program does not result in governmental indoctrination.*

A second primary criterion set forth in *Agostini* is that the program of aid to education must not "result in governmental indoctrination of religion." *Agostini*, 521 U.S. at 234. Like the neutral funding criterion, this inquiry is designed to ensure that the government itself, and its officials and employees, do not use their official position to promote or inculcate (or denigrate or disparage) religion. See *Lee* v. *Weisman*, 505 U.S. at 587; *Agostini*, 521 U.S. at 234 (referring to the need to "prevent or to detect inculcation of religion *by public employees*") (emphasis added). The mere requirement that benefits be allocated on a neutral basis is not sufficient: the benefits themselves must be neutral in content. For example, it would violate the Establishment Clause for the government to distribute explicitly religious educational materials to all schoolchildren, even if it did so on a neutral basis. Any religious message or content must originate in the genuinely independent decisions of private parties, not that of government officials.[12] See

[12] The Community Education program struck down in *School District of Grand Rapids* v. *Ball*, 473 U.S. 373 (1985), is an example of a program with an unacceptably high risk of governmental indoctrination. In that program, the public education agency hired part-time public employees to teach subjects of interest to the community in various locations, including religious schools, during non-school hours. The mere fact that this "benefitted" nonpublic school students (along with many other members of the community) did not raise a constitutional problem, but because the public agency deliberately hired religious school teachers for these part-

Board of Education v. *Mergens*, 496 U.S. 226, 250 (1990) ("there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect").

In *Zobrest*, for example, this Court approved the provision of a state-employed sign-language interpreter for a deaf student at a religious school, "even though she would be a mouthpiece for religious instruction," because the program's "neutral eligibility criteria ensured that the interpreter's presence in a sectarian school was a 'result of the private decision of individual parents' and '[could not] be attributed to *state* decisionmaking.'" *Agostini*, 521 U.S. at 226 (quoting *Zobrest*, 509 U.S. at 10). Only if the interpreter herself had originated religious messages "by altering her translation of classroom lectures" would there have been a constitutional concern. *Ibid.* Similarly, in *Agostini*, the Court carefully considered the evidence of record to determine whether there was any realistic danger "that any [public school] instructor teaching on parochial school premises attempted to inculcate religion in students." *Id.* at 226-227.[13] For much the same reason, the Court in *Board of Education* v. *Allen* insisted that textbooks selected by the state and supplied to nonpublic schools be secular in content. 392 U.S. at 244-245. In none of these cases was the aid invalidated because the nonpublic school itself engaged in religious "indoctrination" (*i.e.*, instruction). See also *Witters*, *supra* (upholding neutral program in which government aid was used to procure religious instruction by private choice from a private institution).

The prohibition against "governmental indoctrination" is easily satisfied here. The statute limits Chapter 2 assistance to "secular,

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time government jobs, the effect of the program was not neutral. *Ball*, 473 U.S. at 384.

[13] In earlier cases, the Court simply presumed, as a matter of law, that the placement of public employees would have this impermissible effect—a presumption that was abandoned in *Agostini* in favor of an actual examination of record evidence. *Agostini*, 521 U.S. at 223-225.

neutral, and nonideological services, materials, and equipment." 20 U.S.C. § 7372(a)(1). See *Lemon*, 403 U.S. at 616 ("Our decisions from *Everson* to *Allen* have permitted the States to provide church-related schools with secular, neutral, or nonideological services, facilities, or materials"). As explained above (at 12), and as the district court found, federal, state, and local officials have implemented effective screening and monitoring procedures that, individually and collectively, operate to provide reasonable assurance that reference books and materials and equipment loaned to students attending nonpublic schools comply with this statutory requirement. See Pet. App. 107a ("these controls are sufficient to prevent Chapter 2 benefits from being diverted to religious instruction"[14]); accord *Walker*, 46 F.3d at 1467-1468.

Unlike *Agostini* and *Zobrest*, moreover, this program does not involve state-paid teachers or personnel. Accordingly, there is even less danger of governmental indoctrination than in those cases. To be sure, government officials are involved in the selection of books and other materials under Chapter 2. But like the state statute upheld in *Allen*, Chapter 2 ensures that any books, materials, or equipment purchased by public school authorities with Chapter 2 funds must be "secular, neutral and nonideological." This ensures that government officials cannot use this authority to indoctrinate. Indeed, as in *Allen* (392 U.S. at 239), the books and materials are chosen from a list prescreened for availability in both public and nonpublic schools. With respect to this "no governmental indoctrination" criterion, Chapter 2 is indistinguishable from the textbook loan program upheld in *Allen*.[15]

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[14] The court of appeals did not disturb this factual finding, relying instead on a per se rule against public funding of instructional materials, purportedly derived from *Meek* and *Wolman*. Pet. App. 66a-70a.

[15] This Court has repeatedly reaffirmed *Allen*. See *Agostini*, 521 U.S. at 231; *Kendrick*, 487 U.S. at 608; *Corporation of Presiding Bishop* v. *Amos*, 483 U.S. 327, 336 (1987); *Grand Rapids* v. *Ball*, 473 U.S. at 393; *Mueller*, 463 U.S. at 393; *Wolman*, 433 U.S. at 237; *Roemer* v. *Board of Public Works*, 426 U.S. 736, 746 (1976); *Meek*, 421 U.S. at 359-362; see also *Rosenberger*, 515 U.S. at 876 (Souter, J., dissenting). This case is indistinguishable.

In addition, Chapter 2 benefits are limited to materials that "supplement," not "supplant" funds from non-federal sources. 20 U.S.C. § 7371(b). See *Bennett* v. *Kentucky Dep't of Education*, 470 U.S. 656 (1985); *Bennett* v. *New Jersey*, 470 U.S. 632 (1985) (explaining how this restriction is interpreted and enforced). This limitation provides additional assurance that aid will not "indirectly finance religious education" by "reliev[ing] the sectarian schools of costs they otherwise would have borne in educating their students." *Agostini*, 521 U.S. at 226; *Zobrest*, 509 U.S. at 12.[16] Moreover, no funds go to religious schools under Chapter 2. The funds go to state and local educational agencies, which purchase the instructional materials and equipment and lend them to the

[16] In *Agostini*, the Court referred to the "supplement, not supplant" provisions of Title I as a further safeguard against the possibility that the program would "impermissibly finance religious indoctrination." 521 U.S. at 228-230. Chapter 2 contains the identical safeguard. 20 U.S.C. § 7371(a)(3). The *Agostini* Court did not, however, hold that a "supplement, not supplant" provision is constitutionally *required*, and we urge the Court not to take such a step in this case, where its absence is not an issue.

To begin with, the line between supplementing and supplanting is not always clear (see *Agostini*, 521 U.S. at 246 (Souter, J., dissenting)), and would introduce a new source of uncertainty and confusion into constitutional jurisprudence in this area. Moreover, it is not obvious that a neutral, generally applicable benefit program needs to be supplemental in order to pass constitutional muster. Churches receive postal subsidies and fire and police protection, faith-based social welfare organizations receive grants, and religious colleges receive extensive financial assistance without being forced to show that they would not otherwise have undertaken those expenditures. In *Committee for Public Education & Religious Liberty* v. *Regan*, 444 U.S. 646 (1980), this Court upheld state reimbursement for an expense that the religious schools would otherwise have had to bear out of their own resources. Indeed, this Court has repeatedly made clear that it "has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends." *Hunt* v. *McNair*, 413 U.S. 734, 743 (1973); *Regan*, 444 U.S. at 658. See also *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 775 (1973) (past cases have approved nonreligious aid even if it "free[d] the budgets of those schools for use in other nonsecular areas").

individual schools.[17] Title to the materials and equipment remains in the local educational agency. As in *Agostini*, these supplementary safeguards make the possibility that Chapter 2 could result in "governmental indoctrination" all the more remote.

3. *The Chapter 2 program does not result in excessive entanglement.*

The third "primary criterion" set forth in *Agostini* is whether the program of aid to education would "create an excessive entanglement." 521 U.S. at 234. While this inquiry resembles the entanglement "prong" that has so long bedeviled analysis under the *Lemon* test,[18] the *Agostini* Court made important modifications. Under prior law, entanglement could be found in three circumstances: (1) as a result of pervasive monitoring of religious institutions to ensure that government aid did not advance religion, (2) as a result of "administrative cooperation" between government officials and religious institutions, and (3) as a result of "political divisiveness" generated over controversial aid programs. See *Agostini*, 521 U.S. at 233. The *Agostini* Court held that "the last two considerations are insufficient by themselves to create an 'excessive' entanglement" (*id.* at 233-234), and it modified the first consideration by making it less absolute. See *id.* at 234 ("we have not found excessive entanglement in cases in which States imposed far more onerous burdens on religious institutions than the monitoring system at issue here") (citing *Bowen* v. *Kendrick*, 487 U.S. at 615-617).

[17] We do not mean to imply that it would necessarily be unconstitutional for funds to go to religious schools under a suitably neutral program (see *Columbia Union College* v. *Clark*, 119 S. Ct. 2357 (1999) (Thomas, J., dissenting from denial of cert.); *Regan*, *supra*), but simply that the Court need not confront that issue here.

[18] See *Wallace* v. *Jaffree*, 472 U.S. at 109-110 (Rehnquist, J., dissenting); *Aguilar* v. *Felton*, 473 U.S. at 426-430 (O'Connor, J., dissenting); Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 681 (1980) (attributing many of the anomalous results of Establishment Clause cases to the "'entanglement' prong").

It has not always been clear what constitutional value is served by the entanglement inquiry. The Court has expressed concern that entanglement might "have the effect of advancing or inhibiting religion" (*Agostini*, 521 U.S. at 233), but, in all candor, it is difficult to see how entanglement could have the effect of "advancing" religion. At least in its usual form, "entanglement" involves excessive or intrusive methods of ensuring that religiously affiliated organizations comply with regulatory requirements. That does not advance religion. The real concern, we think, is the "danger that pervasive modern governmental power will ultimately intrude on religion." *Lemon*, 403 U.S. at 620. In this sense, the entanglement inquiry remains a vital aspect of First Amendment jurisprudence. It prevents the government from constructing aid programs in ways that intrude too deeply into religious autonomy.

In *Lemon*, for example, two States proposed to contribute to the salaries of certain teachers in religious schools, on the express conditions that they refrain from teaching any course in religion, use only teaching materials that are used in public schools, and avoid any "subject matter expressing religious teaching," including morals, in the courses they teach. 403 U.S. at 608, 610. The effect of such conditions would be devastating, since they would mean not only that the government's *own* contribution to the educational process be confined to the secular, but that the entirety of *the recipients*' classroom teaching be secularized. The program thus amounted to a bribe to the school to secularize its own offerings, or, conversely, a fine for refusing to do so. The programs were rightly struck down not as an "advancement of religion" (for they were not), but because of the excessive "control and surveillance" they entailed. *Id.* at 621. Aid must take a form that does not result in excessive governmental interference with the religious decisions of private schools and families or other private institutions.[19]

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[19] It is somewhat mysterious why taxpayer plaintiffs have standing to object to this kind of entanglement. The entangling conditions appear to implicate the free exercise rights of the recipient, rather than any interests of the taxpayer. See *Tilton* v. *Richardson*, 403 U.S. 672, 694 (1971) (Douglas, J., dissenting) ("both the Free Exercise Clause and academic freedom are violated when the Government agent must be present to determine whether the course content is satisfactory"); Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1383 (1981) ("The Court has explained why taxpayers have standing to challenge government support of religion, but it has never explained why taxpayers have standing to argue that an aid program entangles the state in the church's affairs. Only the church is harmed by such interference, and only it should have standing to complain. * * * And if the church itself complained, its claim would sound most naturally in the free exercise clause"). It would therefore make more sense to allow the recipients to obtain the benefits and then to challenge the unconstitutional conditions. Whether the challenged entanglements were essential to the program could then be addressed under the rubric of severability.

In any event, Chapter 2 does not entail significant—let alone excessive—entanglement. The district court examined the "controls in place to prevent Chapter 2 benefits from being diverted to religious use" and found that they did "not result in excessive entanglement between church and state." Pet. App. 108a. That finding was not disturbed by the court of appeals. Since even "far more onerous" forms of entanglement than that entailed by Title I are within the permissible range (*Agostini*, 521 U.S. at 234), it is fantastic to think that the modest and unobtrusive controls in this case rise to a constitutional dimension.

The inherently neutral and nonideological forms of aid at issue here do not threaten the religious autonomy of the nonpublic schools, or their ability to educate their students in accordance with their religious tradition. It does not make a Lutheran school less Lutheran to have a richer collection of secular reference works in its library. Under Chapter 2, no school is required to secularize its curriculum to enable its students to gain access to Chapter 2 computers, software, and other materials. To be sure, the guidelines imposed by the State require that Chapter 2 equipment and materials be used only for courses in secular subjects. See pages 6-7, *supra*. But that restriction is easily administered through the requirement of usage logs for the equipment, and it does not inhibit or discourage the schools from offering whatever courses of religious instruction they deem appropriate. Nor do the guidelines prevent a student from using a computer to gain access to a religious website, just as students can at a public school or

public library. Chapter 2 was carefully designed to meet its statutory purpose of "increasing the academic achievement levels of all children" (20 U.S.C. § 7303), without interfering with the academic freedom or religious autonomy of the institutions they attend.

Applying the constitutional criteria laid down by this Court in *Agostini*, therefore, the Chapter 2 program in Jefferson Parish is plainly constitutional. Nothing in the Fifth Circuit's opinion contradicts that conclusion, because the court of appeals refused to apply *Agostini* to this case. We will now turn to the court's alternative analysis, and show why it is not persuasive.

B. The "No Substantial Aid" Approach Should Be Rejected.

As explained above, the court of appeals believed that this case was directly controlled by *Meek* v. *Pittenger* and *Wolman* v. *Walter*. Pet. App. 65a-71a. In a departure from then-established precedent, those cases stated the proposition that "[s]ubstantial aid to the educational function of [religious] schools * * * necessarily results in aid to the sectarian school enterprise as a whole." *Meek*, 421 U.S. at 366; *Wolman*, 433 U.S. at 250. In practice, however, the rhetorical absolutism of those decisions masked a mishmash of inconsistent judgments about various forms of aid: textbooks are permitted but not globes, maps, or science kits; transportation to religious schools is permitted but not transportation on field trips from religious schools to secular sites; diagnostic assistance is permitted on-site, but not remedial assistance; remedial assistance is forbidden on site but permitted in trailers parked just off school property; grants can be given to religious colleges but not to religious elementary and secondary schools. We submit that *Meek* and *Wolman* do not compel the lower court's conclusion in this case. But if they do, *Meek* and *Wolman* and the no-aid principle they reflect (however inconsistently) are unsound and have been implicitly overruled by more recent decisions.

1. Meek *and* Wolman *do not control this case.*

Read narrowly, the Court's decisions in *Meek* and *Wolman* do not foreclose application of the analytical framework set forth in

Agostini to the facts of this case. Both *Meek* and *Wolman* involved statutes that the Court viewed as providing a highly disproportionate benefit to religious schools, in apparent violation of the Establishment Clause's command of neutrality between religion and nonreligion. As the Court observed in *Meek*, for example, of the 1,320 private schools eligible for participation in the Pennsylvania program at issue there, "more than 75% [were] church-related or religiously affiliated educational institutions." 421 U.S. at 349. Accordingly, the "primary beneficiaries" of that statute were "nonpublic schools with a predominant sectarian character." *Ibid.*; see *Zobrest*, 509 U.S. at 11-12 (explaining *Meek* as a case involving "massive aid" exclusively to private and mainly religious schools). The statute at issue in *Wolman* likewise provided a disproportionate benefit to religious schools. Of the 720 private schools eligible for the program challenged in that case, "all but 29" were religious. 433 U.S. at 234. In short, the Court did not view the benefit to religious schools in these cases as the consequence of a neutral program of aid to all forms of education.[20]

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[20] To be sure, as the Fifth Circuit pointed out, the purpose of the programs in *Meek* and *Wolman* was to make available to nonpublic students a subset of the educational materials and services already available, for free, to students at public schools. Pet. App. 69a. But the Supreme Court, at that time, did not view the issue that way. It viewed the programs as targeted to nonpublic schools. Compare *Nyquist*, 413 U.S. at 782-783 n.38 (treating tuition aid program as "directed exclusively to private schools and their students" even though it was an attempt to extend to all children a portion of the benefits already provided to public school students); *Public Funds for Public Schools* v. *Marburger*, 358 F. Supp. 29, 36 (D.N.J. 1973) ("unlike the legislative programs in *Allen* and *Everson*, the assistance provided by Section 5 is not extended to parents of all students but only to a special class; that is, to the parents of children who attend nonpublic schools which are * * * primarily religiously oriented"), *aff'd*, 417 U.S. 961 (1974). Since the opinions in *Meek* and *Wolman* stated that the results were "compelled" by *Nyquist* (*Wolman*, 433 U.S. at 250), and "directly supported, if not compelled" by *Marburger* (*Meek*, 421 U.S. at 366 n.16), it is evident that the Court considered the programs to share the same constitutional defects. Thus, the Fifth Circuit was not correct in stating that "the percentages discussed in *Meek* and *Wolman* were completely irrelevant to the constitutionality of the programs." Pet. App. 69a-70a. On the contrary, the disproportionate benefit to religion was essential to their holdings.

In contrast to *Meek* and *Wolman*, this case involves a genuinely evenhanded program in which aid is "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted." *Witters*, 474 U.S. at 487-488. As the Ninth Circuit observed on virtually identical facts, Chapter 2 "provides for the participation of private school students on an equitable basis, with equal expenditures for private and public school students." *Walker*, 46 F.3d at 1454. Nor is Chapter 2 "skewed toward religion" (*Witters*, 474 U.S. at 488) in practice. Rather, the record demonstrates that more than 70 percent of participating schools are *public*, and many of the remaining private schools that participate are secular. As the district court expressly found, "it is clear that the overwhelming percentage of Chapter 2 benefits is provided to the public schools." Pet. App. 107a.

This is therefore not a case in which religious schools or parents comprise even a majority of program beneficiaries—let alone an overwhelming majority, as in *Meek* or *Wolman*.[21] To the contrary, both the formal criteria for participation in Chapter 2 benefits and the resulting array of beneficiaries demonstrate that the program here is neutral. It is possible, therefore, for the Court to resolve this case without revisiting the merits of the *Meek-Wolman* cases upon which the court of appeals relied.

That said, however, if the Court concludes that these cases are indistinguishable, there are several reasons why they should be overruled. The "no substantial aid" theory upon which they rest has no foundation in the purposes or history of the Establishment Clause, has led to incoherent and inconsistent decisions, has produced terrible practical consequences, and has unnecessarily

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[21] We are not suggesting that a program is necessarily unconstitutional because of apparently disproportionate effects. Indeed, the Court explicitly rejected that suggestion in *Agostini*. See 521 U.S. at 229 ("Nor are we willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid"); see also *Mueller*, 463 U.S. at 401 ("We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law").

created a conflict between the Establishment Clause and other parts of the First Amendment. As this Court has already acknowledged, moreover, subsequent decisions have seriously eroded, if not implicitly overruled, *Meek* and *Wolman*.

2. *The "no substantial aid" theory of* Meek *and* Wolman *has no foundation in the purposes or history of the First Amendment.*

The First Amendment enables Americans of diverse religious (and nonreligious) beliefs to form a political community with the least possible governmental interference with their exercise of religion. Its purpose was not to exclude religious individuals or institutions from neutral, generally available public benefits, but to prevent favoritism or coercion in matters of religion. In defending the proposed Amendment on the floor of Congress, James Madison explained that the "object" that it was "intended to prevent" was that "one sect might obtain a preeminence, or two combine together, and establish a religion to which they would compel others to conform." 1 ANNALS OF CONGRESS 758-759 (J. Gales ed. 1834).

The two Religion Clauses of the First Amendment must be read in conjunction: the Establishment Clause precludes using government resources to favor or compel religious practice, and the Free Exercise Clause precludes using governmental authority to disfavor or prohibit it. As Justice Souter explained for the Court in *Board of Education of Kiryas Joel* v. *Grumet*, 512 U.S. 687, 696 (1994) (citations omitted): "'A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of "neutrality" toward religion,' favoring neither one religion over others nor religious adherents collectively over nonadherents." The purpose of these constitutional arrangements was not to create a more secular society, but to create a diverse and pluralistic society, with religious decisions made by individuals, families, and private institutions. "The Religion Clauses prohibit the government from favoring religion, but they provide no warrant for discriminating against religion." *Id.* at 717 (O'Connor, J., concurring).

The "no substantial aid" theory of *Meek* and *Wolman* has no evident connection to these constitutional objectives. By treating

"pervasively sectarian" schools as somehow suspect or unworthy,[22] the "no substantial aid" theory makes religious affiliation relevant to a citizen's eligibility for otherwise neutral and generally available benefits. *Cf. Wallace*, 472 U.S. at 69 (O'Connor, J., concurring in judgment) ("the religious liberty protected by the Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community"). It creates an incentive for religious schools to secularize their curriculum, and for families to choose secular schools. It is an impediment to the wholesome neutrality that is the heart of First Amendment doctrine. Moreover, because the "no substantial aid" theory cannot possibly be rigorously enforced across the board (are we going to deny the "substantial aid" of police and fire protection to religious institutions, or the substantial benefits of charitable status under the tax laws?), the theory requires courts to make fine distinctions between forms of "aid" that are virtually identical in purpose and economic effect.

As Congress has repeatedly reaffirmed since 1965, providing for the "equitable participation" of all students in programs that provide secular, neutral, and nonideological educational resources is entirely consistent with our constitutional tradition. In this way, the government fosters high quality education for all children—without creating any incentives to seek (or to avoid) religious education, without interfering with the autonomy of the private institutions they choose to attend, and without jeopardizing the government's neutrality toward religion. Such programs foster "pluralism and diversity among [the Nation's] public and nonpublic schools." *Committee for Public Education* v. *Nyquist*, 413 U.S. 756, 773 (1973). From the point of view of American children and

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[22] The very language, "pervasively sectarian," implies disapproval. According to FUNK & WAGNALLS NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1137 (comp. ed. 1987), "sectarian" means "[p]ertaining to a sect; bigoted," and "sectarianism" means "excessive devotion to or zeal for a particular sect." See generally Richard A. Baer, *The Supreme Court's Discriminatory Use of the Term "Sectarian,"* 6 J.L. & POL. 449 (1990). We urge the Court to use the more neutral term, "religious" school.

families, Chapter 2 unquestionably enhances—and in no way threatens—religious liberty.

We readily concede that one part of our disestablishmentarian constitutional tradition is that no one may be forced, through taxation or otherwise, to pay for religious activities. *Rosenberger*, 515 U.S. at 847 (O'Connor, J., concurring). But that principle is not implicated here. Respondents are being taxed to pay for educational materials and resources that benefit all schoolchildren. That has a secular purpose and an effect that is entirely neutral toward religion. Respondents have no legitimate constitutional objection to paying for computers, software, library books, and other instructional materials appropriate for children attending both public and nonpublic schools—any more than taxpayers had a legitimate objection to paying for sign-language interpreters in *Zobrest*, textbooks in *Allen*, bus rides in *Everson*, remedial instruction in *Agostini*, or standardized tests in *Wolman* and *Regan*. Aiding *education*—while remaining neutral with respect to its religious or secular orientation—is not the same as aiding *religion*.

Advocates of the "no substantial aid" doctrine frequently invoke the experience in Virginia and other States in rejecting religious assessments as a form of religious establishment. See, *e.g.*, *Everson* v. *Board of Education*, 330 U.S. at 28-63 (Rutledge, J., dissenting) (relying on James Madison's *Memorial and Remonstrance Against Religious Assessments* to argue that the state should not pay for bus transportation to religious schools). To treat the assessment controversy as a historical parallel to cases involving aid to education, however, is to strain the historical analogy beyond recognition. The proposal against which Madison remonstrated was a tax for the purpose of subsidizing "teachers of the Christian religion," *i.e.*, clergymen. The express purpose of the proposal was to foster and promote religion, and Christianity in particular. See THOMAS J. CURRY, THE FIRST FREEDOMS 136-141 (1986). The funds were earmarked for religious purposes, and the distribution of funds was expressly non-neutral: churches were the only private institutions to which taxpayers could direct their

assessments.[23] By contrast, Chapter 2 and other educational assistance programs have the secular purpose of improving student academic achievement; the funds are used for secular, neutral, and nonideological educational resources; and the funds are distributed neutrally, without discrimination for or against religious schools.

Indeed, there is no historical support for the notion that the Establishment Clause requires governments to discriminate against religious individuals or institutions with respect to generally available public benefits. When this Court first entertained a challenge to a governmental subsidy of the health and welfare activities of religious organizations, it unanimously held that the fact that the recipient institution—a hospital—was "conducted under the auspices of the Roman Catholic Church," which "exercise[d] great and perhaps controlling influence over the management of the hospital," was "wholly immaterial." *Bradfield* v. *Roberts*, 175 U.S. 291, 298-299 (1899). Since that time, church-related groups and institutions providing health, welfare, and educational services (other than elementary and secondary education) have routinely been recipients of governmental aid. See generally STEPHEN V. MONSMA, WHEN SACRED AND SECULAR MIX: RELIGIOUS NONPROFIT ORGANIZATIONS AND PUBLIC MONEY (1996).

The historical record provides no reason to create a special exception for elementary and secondary education. At the time of

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[23] Assessments paid by taxpayers who preferred not to contribute to any church were paid into the "public Treasury," to be "disposed of under the direction of the General Assembly," for "seminaries of learning." A Bill Establishing a Provision for Teachers of the Christian Religion, *reprinted in Everson*, 330 U.S. at 74 (Supplemental Appendix to dissenting opinion of Rutledge, J.). Taxpayers did not have the option of directing their assessments to other private institutions of their choice. Indeed, since there were no public schools in Virginia at that time, and education was almost exclusively provided under religious auspices, this meant—ironically—that those who objected to giving their money to churches would be forced to give it to church-related schools. As one scholar has pointed out, "[t]he essence of the general assessment was massive discrimination in favor of religious viewpoints." Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 49 (1997).

the framing of the Bill of Rights, there were virtually no public schools. In the early years of the Republic, public support for education generally took the form of grants to private schools, many of which were religious in nature. RICHARD J. GABEL, PUBLIC FUNDS FOR CHURCH AND PRIVATE SCHOOLS 173-262 (1937); BERNARD BAILYN, EDUCATION IN THE FORMING OF AMERICAN SOCIETY (1960). Early federal aid to education, which typically took the form of land grants, also encompassed private schools, which were often religious. GABEL, *supra*, at 173-179. Until 1864, education in the District of Columbia was provided entirely through private and semi-public institutions, including denominational schools, at public expense. *Id.* at 179.

Only in the second quarter of the 19th Century did the States of the north and west begin to establish public school systems with exclusive rights to public subvention. Even then, the defunding of private schools was not based on any supposed Establishment Clause problems, but primarily on nativist and anti-Catholic opposition to alternatives to the Protestant public schools. See generally LLOYD P. JORGENSON, THE STATE AND THE NON-PUBLIC SCHOOL, 1825-1925 (1987); Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 50-53 (1997).[24] When the federal government undertook its first major program of direct monetary subsidies to elementary and secondary education, through the Freedmen's Bureau, it gave extensive assistance to schools sponsored by religious denominations and missionary societies. See RONALD E. BUTCHART, NORTHERN SCHOOLS, SOUTHERN BLACKS, AND RECONSTRUCTION: FREEDMEN'S EDUCA-

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[24] For additional historical accounts of the early cooperation between governments and religious schools and the later struggles to defund Catholic schools, see, *e.g.*, CARL F. KAESTLE, PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780-1860 (1983); DIANE RAVITCH, THE GREAT SCHOOL WARS, NEW YORK CITY, 1805-1973: A HISTORY OF THE PUBLIC SCHOOLS AS BATTLEFIELD OF SOCIAL CHANGE (1974); CHARLES LESLIE GLENN, THE MYTH OF THE COMMON SCHOOL (1988).

TION, 1862-1875, at 4-9, 33-52 (1980).[25] This shows that, at the time the Establishment Clause was applied to the States through the Fourteenth Amendment, it was not understood to bar aid to religious societies for the education of the young.

In the 1870s, Republicans in Congress attempted to amend the Constitution to prohibit aid to "sectarian" schools (while affirming the practice of Bible reading in the "public" schools), but they were unsuccessful. See Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL. 657 (1998). Nonetheless, many States adopted "little Blaine amendments," and hostility to Catholic education remained an effective bar to any aid to private schooling in most of the States until after World War II. *Ibid.*; see also John T. McGreevy, *Thinking on One's Own: Catholicism in the American Intellectual Imagination, 1928-1960*, 84 J. AM. HIST. 97 (1997).

In short, the "no substantial aid" doctrine cannot be traced to the historical principles and purposes of the Establishment Clause. The Establishment Clause bars coerced taxpayer support for religion as such, but it does not bar taxpayer support for the health, educational, and public welfare activities of religious organizations. When the government provides computers, software, library books, and other secular, neutral, and nonideological materials to children in all schools, it acts in conformity with this Nation's longstanding policy of neutrality—not hostility—toward religion.

3. Meek *and* Wolman *have led to inconsistent and incoherent results, which are detrimental to the education of America's children.*

As noted above, in its early decisions this Court consistently "permitted the States to provide church-related schools with secular, neutral, or nonideological services, facilities, or materials."

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[25] By statute, Congress instructed the Freedmen's Bureau to work through private benevolent associations (the majority of which were religious in character) whenever they provided suitable teachers. Act of July 16, 1866, ch. 200, § 13, 14 Stat. 173, 176.

Lemon, 403 U.S. at 616. These services and materials included, most notably, bus transportation (upheld in *Everson*) and textbooks (upheld in *Allen*). The Court only struck down programs that were skewed in favor of religious or nonpublic schools, or that involved forms of aid that might entail governmental indoctrination.

In *Meek* and *Wolman*, the Court reviewed state programs involving other secular and neutral forms of assistance, such as tape recorders, maps, globes, science kits, film projectors, standardized tests, speech and hearing diagnostic and remedial services, and field trip transportation, as well as expanded textbook loan programs. Faced with the realization that its prior approach would countenance considerably greater quantities of aid to nonpublic schools than some of the Justices had realized, the Court split three ways in *Meek*. Three Justices (Burger, Rehnquist, and White) voted to uphold the new programs on the authority of prior precedent. 421 U.S. at 385, 387-396. Three Justices (Douglas, Brennan, and Marshall) argued that the "political divisiveness" reasoning of *Lemon* had superseded *Allen*, and, consequently, that all of the challenged aid, including the textbook loan program, was unconstitutional. *Id.* at 378-379. A three-Justice plurality (Stewart, Blackmun, and Powell) voted to reaffirm *Allen* but to invalidate other programs that provide "substantial aid" to the "educational function" of religious schools. Compare *id.* at 359-362 (reaffirming *Allen*) with *id.* at 366 (adopting the new doctrine).

The plurality made no attempt to reconcile these halves of its opinion, as the six other Justices trenchantly pointed out. 421 U.S. at 377-378 (Brennan, J.); *id.* at 389-390 (Rehnquist, J.).[26] Nor did the plurality explain why the reasoning of the prior decisions was wrong. It simply observed that "faced with the substantial amounts of direct support authorized by [the state statute], it would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed by many of Pennsylvania's church-related elementary and secondary schools." *Id.* at 365.

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[26] Textbooks, as the *Allen* Court noted, are "critical to the teaching process" (392 U.S. at 245), and therefore would be an unconstitutional form of aid if the approach of *Meek* and *Wolman* were consistently applied.

To the extent that this conclusion rested on the "substantial amounts" of tax money involved, it cannot possibly be correct. If, in principle, a program of this sort were an establishment of religion, it would be objectionable even if it involved only "three pence." See Madison, *Memorial and Remonstrance* ¶ 3, 330 U.S. at 65. If, in principle, the provision of secular, neutral, and non-ideological educational resources to all schoolchildren is not an establishment of religion, the magnitude of the program cannot make it so. Yet the plurality offered no reason, in principle, to distinguish between textbooks and other instructional aids. This lack of rationale became even more painfully obvious in *Wolman*, where the plurality acknowledged the "tension" between its new approach and *Allen*, and could say only that "we choose" not to "extend" the reasoning of *Allen* to other cases. *Wolman*, 433 U.S. at 251-252 n.18 (plurality opinion).

The new approach articulated by the *Meek* plurality sounded absolutist ("no" substantial aid), but in practice entailed many questions of degree and characterization, which would plague the Court in subsequent cases. How much aid is "substantial"? How could the courts distinguish between aid to the "educational functions of the schools" and to the physical, psychological, social, and pedagogical needs of the students? Moreover, how could the courts distinguish between "pervasively sectarian" and "non-pervasively sectarian" institutions?[27]

[27] This is yet another example of a distinction that was created by a minority of the Court. In *Tilton* v. *Richardson*, 403 U.S. 672 (1971), a companion case to *Lemon*, a plurality concluded that different constitutional strictures apply to aid to elementary and secondary schools (because they are pervasively sectarian) than to colleges (because they are not). *Id.* at 684-689. A majority of the Court explicitly rejected that distinction, and was prepared to hold that the same constitutional analysis is applicable to all aid to education. See *id.* at 667-668 (White, J.); *id.* at 659-661 (Brennan, J.). But because those Justices were divided (some voting to uphold aid in both contexts and some voting to strike it down in both contexts), the distinction survived despite the fact that a majority of the Court thought it indefensible.

The difficulties of the *Meek* approach became even more evident in the next case, *Wolman*. In that case, a shifting plurality stated that it is unconstitutional for the state to provide remedial services (including speech, hearing, and psychological therapy) by public employees on nonpublic school property; to loan instructional materials and equipment to students at nonpublic schools; and to pay for transportation for field trips from nonpublic schools to secular sites. The plurality sustained programs involving textbooks, standardized tests and grading, diagnostic services by public employees on nonpublic school property, and remedial services by public employees off of nonpublic school property. As a perusal of the opinion reveals, however, the reasoning applied to one form of aid was inconsistent with that applied to other forms of aid, leading to the impression that the results were more arbitrary than principled.

If ever a constitutional theory has "proven to be intolerable simply in defying practical workability" (*Planned Parenthood* v. *Casey*, 505 U.S. 833, 854 (1992)), it is the "no substantial aid" doctrine of *Meek* and *Wolman*. Commentators of every jurisprudential stripe, on and off the Court, have criticized this line of cases for incoherence and inconsistency.[28] Perhaps the best-known comment on the decisions came from Senator Daniel Patrick Moynihan, who observed that the Court had approved books for students in religious schools but not maps, and queried what the Court would do with an atlas—"a book of maps." 124 Cong. Rec.

[28] See, *e.g.*, LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 128-129 (1986); Norman Redlich, *Separation of Church and State: The Burger Court's Tortuous Journey*, 60 NOTRE DAME L. REV. 1094, 1109 (1985); John Garvey, *Another Way of Looking at School Aid*, 1985 SUP. CT. REV. 61, 67; Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 680-681 (1980); John H. Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 CAL. L. REV. 847, 847-848 (1984); Antonin Scalia, *On Making It Look Easy by Doing It Wrong*, *in* PRIVATE SCHOOLS AND THE PUBLIC GOOD: POLICY ALTERNATIVES FOR THE EIGHTIES 173 (Edward M. Gaffney, ed. 1981).

25661 (1978). And consider this colloquy during the oral argument in *Zobrest*:

QUESTION: Mr. Ball, you're not really going to try to reconcile all our entanglement cases, are you, or anything? [General laughter.]

QUESTION: Are you going to tell us why a globe is okay, but a book isn't and you know?

MR. BALL: The answer is that—

QUESTION: Senator Moynihan's question, what about a map and a book?

MR. BALL: The answer is that I will not, Your Honor. [General laughter.][29]

The real problem, of course, is not that the *Meek-Wolman* doctrine has been subjected to criticism; it is that it prevents legislators, educators, and lower courts from making accurate judgments about the constitutional constraints in this area. That, in turn, means that educational policy will be distorted by unpredictability and arbitrariness, to the detriment of students in religious schools.

Meek and *Wolman* lead educators to believe that only a few narrow forms of assistance to religious school students are permissible. This fosters discrimination and unfairness. Students in secular schools receive educational services and resources in accordance with their needs; students in religious schools receive resources in accordance with legalistic distinctions. But as Justice O'Connor has commented, if the federal government provides a secular educational service "on-site at public schools and at nonsectarian private schools, it is only fair that it provide it on-site at sectarian schools as well." *Kiryas Joel*, 512 U.S. at 717 (concurring opinion).

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[29] Transcript of Oral Arg. at 7, *reprinted in* 224 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW, 513, 521 (Philip B. Kurland & Gerhard Casper, eds. 1994).

This case is a perfect example. The Fifth Circuit interpreted this Court's decisions to hold that States may provide textbooks, but no other instructional materials or equipment, to religious students. This distinction serves no constitutional purpose: computers are increasingly the primary medium of access to information today, just as textbooks were a generation ago. The primary effect of the decision below is to force educational agencies to use less modern, and less effective, pedagogical tools. Despite Congress's worthy intention to serve all schoolchildren, without discrimination, the decision below consigns those who attend religiously affiliated schools to the use of textbooks under the program, while children of other taxpayers are using graphing calculators to solve polynomial equations and reading about the latest in Mesopotamian archeological discoveries on CD-ROMs.

One of Congress's central purposes in enacting Chapter 2 was to enable schools—all schools—to employ innovative and technologically up-to-date methods. See page 13, *supra*. By freezing permissible aid in the era of *Board of Education* v. *Allen* and disallowing any instructional equipment or materials other than textbooks, affirmance of the decision below would deprive millions of children of the benefits of Congress's farsighted approach.

4. The "no substantial aid" theory creates an unnecessary conflict with free speech and free exercise rights.

The result below not only is historically and pedagogically indefensible, but it penalizes schoolchildren for the constitutionally protected choice of attending private religious schools. The Establishment Clause, properly interpreted, prohibits government from *promoting or favoring* religion or religious education; it does not require government to *discriminate against* religious schools or the children who attend them. When the government extends aid to a broad category of beneficiaries on the basis of neutral and secular criteria, it is discriminatory to deny that aid to otherwise eligible recipients solely because they have chosen to attend religious schools. *Cf. Speiser* v. *Randall*, 357 U.S. 513 (1958). The "no substantial aid" theory compels such discrimination.

The "no aid" principle thus goes beyond disestablishment to hostility. By discriminating against children for making the consti-

tutionally protected choice of religious schooling, *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), it violates other, equally important principles of the First Amendment. The Free Exercise Clause prevents the government from denying generally available benefits to otherwise eligible recipients on account of their religious exercise or the religious nature of their speech. "At a minimum," this Court has stated, "the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs." *Church of Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520, 532 (1993). See also *Employment Division* v. *Smith*, 494 U.S. 872, 877 (1990) (under the Free Exercise Clause, government may not "impose special disabilities on the basis of religious views or religious status"); *Jimmy Swaggart Ministries* v. *Board of Equalization*, 493 U.S. 378, 390 (1990) (to "single out" religious activity "for special and burdensome treatment" would violate the Free Exercise Clause); *Hobbie* v. *Unemployment Appeals Comm'n*, 480 U.S. 136, 148 (1987) (Stevens, J., concurring) (the Free Exercise Clause "protect[s] religious observers against unequal treatment").

To make matters worse, the "no substantial aid" doctrine also creates serious constitutional tension with the Free Speech Clause. The religious activity that takes place in religious schools is, after all, speech. Teaching is speech. And the government may not exclude individuals or groups from the benefits extended to similarly situated persons on the basis of the religious viewpoint of their speech. *Rosenberger*, 515 U.S. at 830; *Lamb's Chapel* v. *Center Moriches School District*, 508 U.S. 384 (1993); *Widmar* v. *Vincent*, 454 U.S. 263 (1981).

A rule that denies secular, neutral, and nonideological educational materials and resources to students because they have chosen to attend a religious school thus puts the Establishment Clause on a collision course with the rest of the First Amendment. It condones discrimination against—not neutrality toward—religion, in violation of both the Free Speech and Free Exercise Clauses. This is a highly implausible reading of the First Amendment, taken as a whole. As Justice White wrote in dissent in *Lemon*, 403 U.S. at 665:

> Where a state program seeks to ensure the proper education of its young, in private as well as public schools, free exercise considerations at least counsel against refusing support for students attending parochial schools simply because in that setting they are also being instructed in the tenets of the faith they are constitutionally free to practice.

5. *The* Meek-Wolman *doctrine has been undermined by subsequent decisions.*

As we have shown, the principle under which the Fifth Circuit decided this case—*Meek* and *Wolman*'s prohibition on the provision of instructional materials and equipment to students in religious schools—is predicated on an interpretation of the Establishment Clause that has no grounding in the purposes of the First Amendment and was an unexplained departure from then-controlling precedent. The "no substantial aid" principle has produced distinctions between various pedagogical resources that are "neither 'sensible' nor 'sound.'" *Agostini*, 521 U.S. at 228. Moreover, in cases since *Meek* and *Wolman*—indeed, even in portions of *Meek* and *Wolman* themselves—the Court has repeatedly rendered decisions inconsistent with that theory. The standardized tests approved in *Wolman* and *Regan*, the courses paid for by the state in *Witters*, the sign language interpretation in *Zobrest*, and the remedial education services approved in *Agostini*—not to mention the textbooks approved in *Allen* and in *Meek* and *Wolman* themselves—all obviously aided the educational function of the schools involved. Indeed, the Court has already expressly disavowed the rule "that all government aid that directly aids the educational function of religious schools is invalid" (*Agostini*, 521 U.S. at 225), and has overruled a decision that relied on *Meek*. *Id.* at 236 (overruling *Grand Rapids* v. *Ball* in relevant part); see *Ball*, 473 U.S. at 386 ("[t]he programs before us today share the defect that we identified in *Meek*"). If *Aguilar* and *Ball*, which were applications of *Meek* and *Wolman*, have been overruled, it is not a large step to overrule *Meek* and *Wolman*.

Rather than leave legislators, educators, and lower courts in doubt about the constitutional standard to be applied to aid-to-education cases, we suggest that the Court make clear that the *Agostini* criteria apply, and that any prior inconsistent decisions are

no longer good law. This would spare governments, litigants, and the courts the expense and confusion of trying cases under precedents and constitutional theories that this Court has long since discarded.

The *Agostini* criteria provide a succinct exposition of Establishment Clause principles, grounded in the historic purposes of the First Amendment, consistent with the vast majority of this Court's past decisions (other than for a few years in the 1970s), and capable of clear and consistent application. Most of all, the *Agostini* criteria allow Congress and the States to pursue the laudable objective of improving the academic achievement of *all* of America's children, without discrimination based on the religious or secular nature of the school they attend. Under those criteria, the Chapter 2 program at issue in this case is plainly constitutional.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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